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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HUGO ISRAEL LOPEZ, Defendant and Appellant.	G042140 (Super. Ct. No. 07CF4018) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed and remanded for resentencing.

John F. Schuck, under appointment by the Court of Appeal, and Michael Ian Garey for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Convicted of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)) and hit and run with permanent injury and death (Veh. Code, § 20001, subds. (a), (b)(2), (c)), defendant Hugo Israel Lopez contends the trial court prejudicially erred in excluding defense evidence and in instructing the jury. He also contends the prosecutor committed misconduct and, if the conviction is not reversed, the matter must be remanded for resentencing. We affirm the convictions and remand for resentencing.

I

FACTS

The information charged defendant with one count each of vehicular manslaughter by unlawful act with gross negligence while intoxicated (Pen. Code, § 191.5, subd. (a), count one), hit and run with permanent injury or death (Veh. Code,[1] § 20001, subds. (a), (b)(2), count two), driving under the influence and causing bodily injury (§ 23153, subd. (a), count three), and driving with a .08 percent or greater blood-alcohol level and causing bodily injury (§ 23153, subd. (b), count four) on November 18, 2007. The information also alleged a hit-and-run enhancement (§ 20001, subd. (c)). The prosecution did not proceed to trial on counts three and four and those counts were dismissed after the trial.

The jury acquitted defendant of the charged vehicular manslaughter, but found him guilty of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)), a lesser included offense, hit and run with permanent injury or death, and found the enhancement true. The court denied defendant's application for probation and sentenced him to the middle term of two years in state prison for the manslaughter plus five consecutive years for the section 20001, subdivision (c) enhancement. The sentence on count two was stayed pursuant to Penal Code section 654.

[1] All undesignated statutory references are to the Vehicle Code.

On November 18, 2007, defendant met his friends Obed Cruz, Jr., and George Pardo at a restaurant for breakfast. They all had hangovers from clubbing the night before. Defendant had a 24-ounce beer at the restaurant. When they left the restaurant, Cruz and Pardo drove in Pardo's Cadillac Escalade to the Holy Sepulcher Cemetery in Orange, to visit the grave of Pardo's father. Cruz took a 12-pack of beer to the cemetery. Defendant arrived 30 minutes to an hour later in his 2002 Escalade with a six-pack of beer. They drank beer mixed with Clamato juice. Cruz said he does not know how many defendant drank, but he told police defendant had four beers. Defendant said he drank four beers at the cemetery.

Defendant, Cruz, and Pardo were at the cemetery for three or four hours. Pardo left the cemetery first, driving his Escalade. Cruz and defendant followed Pardo in defendant's Escalade. Defendant was driving.

At that time, Carolyn Tabb was driving home at 50 miles per hour in her white Mercedes westbound on Santiago Canyon Road, adjacent to the Holy Sepulcher Cemetery, in the lane closest to the curb. There was a motorcycle behind her. As she approached the cemetery, Tabb saw a light colored SUV in the driveway of the cemetery exit. Tabb drives Santiago Canyon Road every day and watches for traffic at each of the cemetery's two exits.

Thinking the driver of the SUV was going to pull out into traffic, Tabb started braking. The SUV did not pull into traffic when Tabb thought it might. Then, when her car was only 25- to 30-feet away, the SUV pulled out "right in front of [Tabb]." Tabb said, "There was nowhere to go." Thinking she would rather risk rolling over than "T-bone" the SUV and ending up underneath it, Tabb turned to her left as hard as she could, making a "really hard left turn." In doing so, Tabb's car was almost parallel with the SUV. The vehicles collided, resulting in a crease on the right side of the Mercedes from the rear of the front wheel well to the end of the passenger door. Tabb estimated her speed to have been 15 to 25 miles per hour at the time of the collision.

When the SUV "clipped" Tabb's Mercedes, the SUV's front end extended further than the front end of the Mercedes. The motorcycle that had been behind Tabb passed her as she collided with the SUV. Tabb said the SUV's front bumper hit the motorcycle, throwing the rider into the air. The two collisions occurred "almost at once, simultaneously, but not quite." The time between the impacts was "almost immeasurable." Tabb got out of her car and went to the fallen rider. She said the SUV moved some, stopped, and then drove off eastbound on Santiago Canyon Road at a high rate of speed.

Graham Green was the motorcycle rider. He died from his multiple injuries at 1:30 a.m. the next morning.

Bradley Lefferdink was driving behind Tabb and the motorcycle. According to Lefferdink, the motorcycle was slightly in front of the Mercedes. Lefferdink saw a gold Escalade start to exit the cemetery. The Escalade "nudged" out a foot to 18 inches into the bike lane. It paused for a number of seconds and then "it nudged out a little further" and stopped for about three to five seconds in the number two lane. It was clear to Lefferdink the Escalade was going to make a left turn. Then the Escalade pulled out in front of the motorcycle and Mercedes, and accelerated to make a left turn. At that point, Lefferdink estimated he was about two car lengths behind the Mercedes and three to three and one-half car lengths behind the motorcycle. Lefferdink turned into the number two lane and braked "pretty aggressively" to avoid a collision.

Lefferdink said the motorcycle slowed and took evasive action, veering into the meridian. The Mercedes also swerved. Lefferdink saw the motorcycle collide with the corner of the Escalade's bumper. He could not tell whether the Mercedes and the Escalade collided.

Christopher Rodriguez testified he was heading northbound on Santiago Canyon Road.[2] He was in the number one lane travelling 40 to 45 miles per hour. In front of him was a motorcycle and in front of the motorcycle was another car. Rodriguez saw an Escalade leaving the cemetery. "[I]t hesitated to stop" and made a rolling stop halfway into the number two lane for a split second, and then the driver "gassed it," hitting the motorcycle and sending the rider into the air.

Jose Palomino had been at the cemetery with his wife visiting his son's grave. His wife was driving. There were two tan Escalades in front of Palomino and his wife. The Palominos were two car lengths behind the second Escalade. The first Escalade sped off and made a left turn onto Santiago Canyon Road. The second Escalade attempted to do the same. It almost clipped a white car. Palomino estimated the second Escalade had been in the road "a couple seconds" before the near collision with the white car.

Palomino, who stated more than once that he had not really been paying attention, said he saw the woman who drove the white car in the center of the road raising her arms and screaming at the driver of the second Escalade. The second Escalade moved forward "a couple seconds" after the near collision to make a left turn, and hit the motorcycle. The Escalade's front bumper came off and the motorcycle ended up near the white car. Palomino estimated that from the time he and his wife were first behind the Escalade to the time it hit the motorcycle, "probably a couple seconds" passed. "It was really fast." Palomino ran to help the motorcycle rider and the Escalade sped off.

Cruz does not remember if defendant stopped before entering Santiago Canyon Road. He believes defendant was changing a CD (compact disc) or turning down the stereo in the exit. Cruz looked to his left when they were already out of the exit and saw a white car heading straight toward them. He does not remember the Mercedes

[2] Santiago Canyon Road is an east/west artery, but traffic is more in a north/south direction. A westbound vehicle would also be considered heading northbound.

swerving, but the Escalade hit the side of the Mercedes. Cruz followed the path of the Mercedes with his eyes to his right after the collision. Shortly thereafter Cruz felt a second impact. "[B]oth impacts were quick." Cruz started to turned back to the front of the Escalade and saw a flash. He looked back to his right again and saw a motorcycle in the same area as the white Mercedes. Defendant drove away after the second crash.

The front bumper of the Escalade still had the license plate on it. Thomas Kenny was eastbound on Santiago Canyon Road when traffic suddenly stopped and he could see there had been an accident. He saw a motorcycle down and a "champagne" colored bumper in the road. Suspecting a hit and run, Kenny looked for a champagne colored vehicle without a front bumper. He saw one make a right turn in front of him on Newport Boulevard and called 911.

Defendant was stopped minutes later driving the Escalade with the missing bumper and license plate. Defendant was extremely unsteady on his feet when he got out of the Escalade. California Highway Patrol Officer Alexandra Mourning could smell a strong odor of an alcoholic beverage on defendant's breath and his speech was thick and slurred. Defendant stated he started drinking beer about 11:00 that morning and stopped at 2:00 that afternoon. Orange Police Officer Martin Suarez had defendant perform a series of field sobriety tests. Defendant failed the tests and was arrested.

After being advised of his *Miranda*[3] rights, defendant said he had been with Cruz and Pardo at the cemetery, and that he took a six-pack of beer to the cemetery. When Pardo left the cemetery in his Escalade and made a left turn onto Santiago Canyon Road, defendant and Cruz followed in defendant's Escalade. Defendant said he looked in both directions and did not see any traffic. He started to make a left turn and immediately felt an impact with the front of his Escalade. Defendant stated he realized he had collided with a black compact car. He started to then make a right turn to pull over and exchange

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

information and felt a secondary impact at the front of his vehicle. He got scared. Cruz told him the second impact was with a motorcycle. Defendant said he finished the left turn and left the scene.

Defendant's blood sample contained a .219 blood-alcohol concentration. His breath sample contained a .20 blood-alcohol concentration. Given defendant's weight and the drinking period he provided, defendant would have had a .25 blood-alcohol level at the time of the accident and would have had to drink 21 to 22 standard drinks to reach that blood-alcohol level.

Maria Padilla, Palomino's wife, testified for the defense. She testified she and Palomino were behind the Escalade as it was leaving the cemetery. The Escalade "proceeded to make a left and then it stopped because there was a white car that came and went into the center divider." Padilla was watching the driver of the white car "making signs and stuff" when she heard an impact and then saw the motorcycle. Padilla does not remember where the Escalade stopped, but it was partially into the intersection. Padilla does not remember and could not give an estimate as to how long the Escalade stopped. The first time Padilla saw the white car was as after it had swerved into the center divider.

The defense's accident reconstructionist, Douglas Edgar, testified that based upon his analysis of the accident, the Mercedes was in front of the motorcycle. He calculated that the Escalade and motorcycle collided two to three feet inside the number one lane, measuring from the number two lane. The skid mark left by the motorcycle indicated it was the result of a panic, or emergency situation where the rear brake is applied as hard as possible. The motorcycle was in the number two lane when the brake was applied. Edgar stated that if the Escalade had been stopped in the number two lane for roughly five seconds, the Mercedes would have been approximately almost 600 feet away at the point the Escalade started into the intersection and with traffic travelling at 50 miles per hour, the Escalade would have needed approximately 4.8 seconds to complete

its left turn. In other words, it could make the left turn safely if the traffic was 366 feet away.

II

DISCUSSION

Evidence of Green's Toxicology Report

To convict an adult defendant of vehicular manslaughter while intoxicated, the prosecution must prove that in addition to driving in violation of section 23152, the defendant committed a misdemeanor or infraction with ordinary negligence and the negligent conduct caused death. (Pen. Code, § 191.5, subd. (b); CALCRIM No. 591.) In the present case, the alleged infraction was a violation of section 21804, subdivision (a). That section requires the "driver of any vehicle about to enter or cross a highway from any public or private property, or from an alley, [to] yield the right-of-way to all traffic, as defined in Section 620, approaching on the highway close enough to constitute an immediate hazard, and [to] continue to yield the right-of-way to that traffic until he or she can proceed with reasonable safety." (§ 21804, subd. (a).)

Prior to trial, defense counsel sought to introduce evidence of a toxicology report indicating Green's blood contained nine to 10 nanograms of THC (the active ingredient in marijuana) per milliliter of blood, an amount counsel stated was two to three times an amount that has been deemed sufficient to cause impairment in driving. The prosecution contended the report was irrelevant and an improper attempt to show contributory negligence on Green's part. "It is well established that a crime victim's contributory negligence is not a defense. [Citations.]" (*People v. Marlin* (2004) 124 Cal.App.4th 559, 569.) Defendant contends the trial court prejudicially erred when it excluded the evidence. He asserts, as he did at trial, the evidence was not intended to show contributory negligence on Green's part. Rather, it was intended to show Green was not a crime victim. In other words, the defense was defendant entered Santiago Canyon Road lawfully, fulfilling his obligation to yield and having done so, oncoming

traffic (including Green) had a duty to yield the right-of-way to defendant under subdivision (b) of section 21804. That section provides: "A driver having yielded as prescribed in subdivision (a) may proceed to enter or cross the highway, and the drivers of all other vehicles approaching on the highway shall yield the right-of-way to the vehicle entering or crossing the intersection."

Defendant maintains the evidence was relevant to the question of which driver — defendant or Green — failed to yield in violation of section 21804. Failure to yield was the key issue, however, it was defendant who inarguably had the initial obligation to yield the right-of-way. That duty continued until he could "proceed with reasonable safety." (§ 21804, subd. (a).) Green had no obligation to yield until defendant complied with his duty to yield and to proceed only once he could do so with reasonable safety. If the jury found defendant met his obligation to yield, it was required it to find defendant not guilty of manslaughter. The reason oncoming traffic thereafter failed to yield was irrelevant.

Defendant relies upon the recently decided case of *United States v. Stever* (9th Cir. 2010) 603 F.3d 747 [2010 D.A.R. 6595] (*Stever*). Authorities found "a marijuana growing operation" in an isolated corner of the property where Stever and his mother lived. Most of the 7000 marijuana plants were on that property, but there were some on the adjoining property as well. The adjoining property belonged to the Forest Service. (*Id*. at p. ___ [2010 D.A.R. 6595].) The trial court, through its discovery and its evidentiary rulings, prevented Stever from introducing evidence that Mexican Drug Trafficking Organizations (DTOs) have been growing marijuana on large tracts of private and public lands in the area and that DTOs' operations exclude Caucasions. (Stever is Caucasion.) (*Id*. at p. ___ [2010 D.A.R. 6596].)

In *Stever,* the defendant argued that if the jury believed a Mexican DTO grew the marijuana it was more probable that Stever was *not* involved in the grow. (*Stever, supra,* 603 F.3d at p. ___ [2010 D.A.R. 6595, 6597].) The Ninth Circuit agreed

with Stever and held that since Stever is Caucasian, the jury should have received his proffered evidence. (*Id*. at p. ___ [2010 D.A.R. 6597-6598].)

Analogizing to *Stever*, defendant argues that had he been permitted to introduce evidence that Green had THC in his system at the time of the collision, the jury may have found it more likely that Green rather than defendant violated his obligation to yield the right-of-way. The fact that Green had smoked marijuana does not make it any more likely that defendant met *his* obligation to yield to oncoming traffic presenting an immediate hazard, an obligation that must be met before the law imposes on other drivers on the road any duty to yield to defendant.

Here, although one witness placed defendant's vehicle partly in the number two lane for a matter of seconds before the accident, all witnesses testified to a collision as soon as defendant accelerated from his stop. The evidence overwhelmingly demonstrated defendant did not yield the right-of-way to approaching traffic presenting an immediate hazard and to continue to yield the right-of-way until he could proceed with reasonable safety, the prerequisite to imposition of a duty to yield on the part of those drivers already on the road. Defendant not only hit Green's motorcycle when defendant pulled out onto Santiago Canyon Road, he also hit Tabb's car and, but for Lefferdink braking "pretty aggressively," he might have hit Lefferdink's car as well. Accordingly, we find the court did not err in excluding from evidence the toxicology report.

Even were we to assume the court erred, the error would be harmless. The jury was instructed the prosecution had to prove defendant "did not proceed into or across a highway in a reasonably safe manner so as to create a duty on the part of drivers of approaching vehicles to yield the right-of-way to the defendant." Defendant's attorney argued defendant safely entered the road and that the collision was the result of Green failing to yield. To find defendant guilty of vehicular manslaughter while intoxicated, the jury necessarily found defendant did not comply with his duty to yield, a duty he was

required to comply with before the duty to yield would shift to drivers of vehicles already on the road.

Prosecutorial Misconduct

"[O]n claims of prosecutorial misconduct our state law standards differ from those under the federal Constitution. With respect to the latter, conduct by the prosecutor constitutes prosecutorial misconduct only if it '"""so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."""' [Citations.] By contrast, our state law considers it misconduct when a prosecutor uses '"""deceptive or reprehensible methods to attempt to persuade either the court or the jury."""' [Citations.] . . . 'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.) "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

During the prosecutor's closing argument, the prosecutor stated, "What was going on? Counsel says, 'Well, maybe Mr. Green was daydreaming.' It was late in the day. It was 4:30 in the afternoon in daylight on a Sunday. There's no evidence to suggest he was dozing off or daydreaming." Defendant contends this was misconduct because the toxicology report showing Green had THC in his blood was excluded and daydreaming is something that might be done by someone who was "stoned."

While it is misconduct for a prosecutor to successfully obtain the exclusion of certain defense evidence and then argue such evidence does not exist because it was not produced at trial (see *People v. Hernandez* (1977) 70 Cal.App.3d 271, 279-280), that

is not what happened here. The prosecutor's brief reference to the lack of any evidence of Green daydreaming was in direct response to defense counsel's argument that Green may have been daydreaming. To that extent, it was invited by defense counsel's argument (*People v. Daniel* (1959) 169 CalApp.2d 10, 13; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 31, p. 489) and did not take advantage of the exclusion of the toxicology report. The fact that defense evidence has been excluded does not mean the prosecution may not respond to scenarios suggested to the jury by the defense.

Along the same lines, defendant contends it was error for the prosecutor to argue to the jury "if the defendant did not violate the right of way of the deceased, then why did the crash occur?" That is not what the prosecutor asked. The prosecutor's comment, which we will quote shortly, addressed an argument put forward by the defense. The defense's accident reconstruction expert testified defendant needed approximately 366 feet of clearance to safely make his left turn and, according to the testimony of at least one witness and the defense expert's calculation based upon that testimony, defendant had at least 600 feet of clearance. It is evident from the prosecutor's argument that she questioned the defense expert's calculation of the distance Tabb was from defendant when defendant entered the roadway and attempted to cross traffic to make a left turn. The prosecutor stated: "Again, if [defendant] needed 366 feet to complete his turn and he had 600 feet, he had plenty of time. Why did this collision happen? [¶] If [Tabb] was far enough away that [defendant] could have made his turn without impacting her, why did he impact her?" This statement referred to Tabb, not Green. The question was a fair one.

Lastly, the prosecutor argued what she and her colleagues refer to as the "rule of one." According to this "rule," the defendant is looking for just one juror to "buy into one of these unreasonable conclusions." In arguing this amounted to misconduct, defendant relies upon *People v. Patino* (1979) 95 Cal.App.3d 11. In that matter the

prosecutor "read the following quotation [to the jury]: 'Under our procedure, the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose even the barest outline of his defense. [¶] He may not be convicted when there is the least fair doubt in the mind of even one juror. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. [¶] What we really need to fear is the archaic formalism and watery sentiment that obstruct, delay, and defeat the prosecution of crime.'" (*Id.* at p. 29.)

Like the *Patino* court, we find the prosecutor's argument — here, the "rule of one" — "does not come within the concept of a fair comment on the evidence or a fair statement of the law applicable to the case." (*People v. Patino*, *supra*, 95 Cal.App.3d at p. 30, italics omitted.) The argument improperly implied the defense had something to gain, and justice would be defeated, if a mistrial should be declared due an inability to reach a verdict. However, also like the *Patino* court (*id.* at pp. 30-31), we find the error harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 835.) The "rule of one" argument was very brief and ended half a sentence after defendant's objection. We cannot conclude this singular, brief argument denied defendant a fair trial.

Jury Instructions

The trial court rejected the following defense pinpoint instruction: "The law does not require a driver approaching an arterial highway to refrain from crossing until the highway is free of all traffic. It places on him the duty of determining, in the exercise of ordinary caution, when a crossing would not 'constitute an immediate hazard.'" "A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142-1143.) The proposed instruction was based upon language in *McAllister v. Cummings* (1961) 191 Cal.App.2d 1, 7 (*McAllister*). However, the failure to give the instruction was not error as the issue was covered by other instructions.

McAllister involved a traffic accident that occurred prior to the 1959 revision of the Vehicle Code. (*McAllister, supra*, 191 Cal.App.2d at p. 5.) The instruction requested in *McAllister* was necessary because the statute in effect at the time, former section 553, required the driver entering a highway to "'"yield the right of way to all vehicles approaching on said highway." Literally, this section would require the prospective entrant from a private road to yield the right of way to all vehicles on the highway regardless of where they were. This would be an unreasonable interpretation.'" (*Id*. p. 6.) Therefore, the *McAllister* court found the trial court erred in refusing McAllister's requested instruction: "'It is the duty of an automobile driver entering a highway from a private driveway to look for approaching cars and not to proceed if one is coming unless, as a reasonably prudent and cautious person he believes, and has a right to believe, that he can pass in front of the other car in safety.'" (*Id*. at p. 5)

The Legislature subsequently enacted section 21804. That section sets forth the respective duties of drivers entering a road and those already on the road. The jury was instructed on the requirements of section 21804. Because section 21804 cured the interpretation problem created by former section 553, there no longer exists the necessity for a special instruction to fully inform the jury of the respective duties to yield. The instruction the court gave informed the jury that defendant was required to yield to traffic "approaching on the highway close enough to constitute an immediate hazard, and shall continue to yield the right-of-way to that traffic until he or she can proceed with reasonable safety." (§ 21804, subd. (a).) The instruction further informed the jury that if defendant yielded as required, then he "may proceed to enter or cross the highway, and the drivers of all other vehicles approaching on the highway shall yield the right-of-way" to defendant. (§ 21804, subd. (b).) The court's instructions fully covered the concept of causation and the duties to yield. The requested instruction was duplicative and not required to be given by the court. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1,

99; *People v. Bolden* (2002) 29 Cal.4th 515, 558.) We find the court did not err in refusing to give defendant's requested instruction.

Sentencing

Defendant attached to his statement in mitigation approximately 80 letters from family, friends, and coworkers. The sentencing court refused to read them. "I know the defense did submit a statement in mitigation that contained numerous, numerous letters. The Penal Code precludes me from considering those letters unless they're part of the probation report. The court may not consider them, so I did not. There were letters attached to the probation report. I'm assuming that they are of similar vein to the ones the defense has submitted." We are unaware of any Penal Code section precluding the court from considering letters in support of a defendant and the Attorney General has not referred to any such statute. Indeed, "a defendant's statement in mitigation is the proper vehicle in which to present additional facts such as letters urging probation. [Citation.]" (*People v. Slater* (1989) 215 Cal.App.3d 872, 875.)

The Attorney General argues defendant forfeited this issue because he did not object when the trial court stated it would not consider the letters and cites *People v. Scott* (1994) 9 Cal.4th 331, 353 as authority for this proposition. *Scott* involved the defense raising for the first time on appeal "defects in the trial court's statement of reasons" for selecting the term of imprisonment. (*Id*. at p. 348.) Our Supreme Court concluded "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Id* at p. 353.) *Scott* does not apply here. By submitting to the court the approximately 80 letters on defendant's behalf, the defense inherently asserted the court was required to consider the letters before imposing sentence.

The question remains whether the court's refusal to consider the letters denied defendant a fair sentencing hearing. (See *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1261; *People v. Peterson* (1973) 9 Cal.3d 717, 726 [sentencing hearing must be fundamentally fair].) In *People v. Covino* (1980) 100 Cal.App.3d 660, the appellate court remanded the matter for resentencing, in part because the court failed to consider mitigating factors "stated in the attorney's, employer's, and friend's letters." (*Id*. at p. 670.)

In denying probation, the court stated, "Given his lack of awareness that he has a drinking problem, and the astounding amount of alcohol he was able to consume without passing out, it is the court's belief that, absent imprisonment, the defendant will be a danger to others. And, therefore, probation is denied." Had the court read the letters submitted on defendant's behalf, the court would have seen that, according to one writer, "After the accident [defendant] has changed not only his personality[,] but his life. He voluntarily enrolled himself in [Alcoholics Anonymous] classes and attended classes [on] a weekly basis. He has also stopped drinking alcohol since the accident." When the court errs in failing to consider properly submitted letters directly refuting the sole stated reason for the denying probation, the error is manifestly prejudicial. We therefore remand the matter to the trial court for resentencing and direct the court to consider the letters previously submitted on defendant's behalf. Of course, the court need not consider any letters asserting defendant is innocent of the charges for which he stands convicted. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1265.) We do not mean to infer by ordering a remand that we think probation should have been granted. Whether probation should be granted is a matter entrusted to the sound discretion of the trial court.

III

DISPOSITION

The convictions are affirmed. The judgment is remanded to the superior court for a new sentencing hearing at which the court is to consider the letters previously submitted on defendant's behalf.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.